Shipley and Terry in their individual capacities moved for summary judgment on grounds of qualified immunity. The State of Tennessee moved for summary judgment on the constitutionality of TORA. The district court considered the evidence of Hall's interviews on the one hand, lay testimony and Hall's expert affidavit of substantial risk of harm on the other, and found sufficient evidence to create factual issues over, *inter alia*, whether the release of the personnel file caused Hall to be placed at substantial risk of harm. App. 31-32. The district court denied all three motions for summary judgment.

Shipley and Terry filed an interlocutory appeal of the qualified immunity decision, and the State appealed the constitutionality decision seeking pendent appellate jurisdiction. Hall moved to dismiss the appeals for lack of jurisdiction. Hall contended that factual issues deprived the appellate court of jurisdiction over the immunity question. *See* 28 U.S.C. §1291; *Behrens v. Pelletier*, 516 U.S. 299, 313 (1996); *Johnson v. Jones*, 515 U.S. 304 (1995); *Mitchell v. Forsythe*, 472 U.S. 511 (1985); *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982); *Cohen v. Beneficial Industrial Loan Corp.*, 337 U.S. 541, 546 (1949). Hall asserted the constitutionality of the statute issue was not inextricably intertwined with the qualified immunity issue. *See Swint v. Chambers County Commission*, 514 U.S. 35 (1995). The court of appeals dismissed the State's appeal for lack of jurisdiction, but reversed the district court's qualified immunity decision without even addressing the jurisdictional issue. While articulating its duty to construe the facts in the light most favorable to Hall, the court of appeals inexplicably ignored Hall's lay testimony and expert affidavit and ruled that any increased risk to Hall was caused not solely by the release of his file, but

"[b]ecause he engaged the media." The court of appeals ruled not only that Shipley and Terry were entitled to qualified immunity, but that no constitutional violation had in fact occurred. App. 6.

The court of appeals misapplied the qualified immunity analysis prescribed by *Saucier v. Katz*, 533 U.S. 194, 201 (2001) by confusing the "office's" conduct with the "city's" conduct. App. 4-5. The court of appeals departed from the accepted and usual course of judicial proceedings by resolving a factual dispute over the cause of the potential risk of harm to Hall rather than viewing the facts in the light most favorable to Hall, and adversely decided officer Hall's due process rights in conflict with this Court's decisions in *Johnson v. Jones*, 515 U.S. 304 (1995) and *Behrens v. Pelletier*, 516 U.S. 299 (1996). By deciding the factual question of what caused Hall to be placed at risk of harm, the court of appeals denied Hall his Seventh Amendment right to trial by jury. *See City of Monterey v. Del Monte Dunes at Monterey*, 526 U.S. 687, 708-09, 718-21 (1999) (Seventh Amendment requires jury determination of fact questions in section 1983 suits); *Tennant v. Peoria & P. U. Ry. Co.*, 321 U.S. 29, 30 (1944) (causation questions require jury resolution). By confusing the conduct of the "officers" with the conduct of the "city" to hold that no constitutional violation occurred at all, the court of appeals reached beyond the qualified immunity question to decide the merits of the case against the City, and may have deprived petitioners of a case or controversy with which to challenge the constitutionality of TORA.

## REASONS FOR GRANTING THE WRIT

This case arises under the Fourteenth Amendment to the Constitution and under 42 U.S.C. §1983.[1] Congress[2] has provided that, in cases of the nature of the case at Bar, the appellate courts would have jurisdiction only of "final decisions" of the district courts. 28 U.S.C. §1291; *see Johnson v. Jones*, 515 U.S. 304, 309 (1995).

The Supreme Court has construed §1291 as allowing appeal before trial of a small class of "collateral orders" which (i) finally decide a question (ii) which is completely "separate from the merits of the action" (iii) in a way that deprives the would-be appellant of effective appellate review. *Johnson v. Jones*, 515 U.S. 304, 310 (1995), *citing Cohen v. Beneficial Industrial Loan Corp.*, 337 U.S. 541 (1949).

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[1] Article III, §2 of the U.S. Constitution prescribes that the judicial power of the United States shall extend to all cases in law and equity arising under the Constitution and laws of the United States. U.S. Const., Art. III, §2. Article III, §1 prescribes the judicial power to be "vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish." U.S. Const., Art. III, §1.

[2] Article I, §8 of the U.S. Constitution gives Congress the power "[t]o constitute Tribunals inferior to the supreme Court." U.S. Const., Art. I, §8(9). Congress, and not the constitution, prescribes and regulates the acquisition and manner of exercise of original and appellate jurisdiction of the lower courts. *Mayor and Aldermen of the City of Nashville v. Cooper*, 73 U.S. 247 (1867). Congress established the district courts in Chapter 5 of part I, and prescribed their jurisdiction in Chapter 85, of part IV, of title 28 of the United States Code. 28 U.S.C. §§81-144, §§1330-1369. Congress established the circuit courts of appeal in Chapter 3 of part I and prescribed their jurisdiction in Chapter 83 of part IV, of title 28 of the United States Code. 28 U.S.C. §§41-49, §§1291-1296.

> The requirement that the matter be separate from the merits of the action itself means that review *now* is less likely to force the appellate court to consider approximately the same (or very similar) matter more than once, and also seems less likely to delay trial court proceedings (for, if the matter is truly collateral, those proceedings might continue while the appeal is pending.

*Johnson*, 515 U.S. at 311 (emphasis in original).

In *Mitchell v. Forsyth*, 472 U.S. 511 (1985), the Court included within that small class of immediately appealable collateral orders those orders which deny a public official's motion for summary judgment asserting the qualified immunity defense established in *Harlow v. Fitzgerald*, 457 U.S. 800 (1982) if "the issue appealed concerned, not which facts the parties might be able to prove, but, rather, whether or not certain given facts showed a violation of 'clearly established' law." *Johnson*, 515 U.S. at 311, *quoting Mitchell*, 472 U.S. at 528. In the case at Bar, the release of the file pursuant to official policy and custom was the action of the City itself in determining liability under 42 U.S.C. §1983. *Monell v. New York City Dept. of Social Servs.*, 436 U.S. 658 (1978).[3] These are the merits of the plaintiff's claim. The actions of Shipley and Terry in failing to establish a procedure to prevent release of the file when the officer thereby could be endangered were the

[3] "[O]nce a municipal policy is established, 'it requires only one application . . . to satisfy fully *Monell's* requirement that a municipal corporation be held liable only for constitutional violations resulting from the municipality's official policy.'" *Pembaur v. Cincinnati*, 475 U.S. 469, 478 n.6 (1986) (county liable for one-time action of official policymaker), *quoting Oklahoma City v. Tuttle*, 471 U.S. 808 (1985).

bases of plaintiff's claims against Shipley and Terry in their individual capacities. These actions conceivably are separate from the merits of plaintiff's claims. However, when the court of appeals assumed jurisdiction over the question whether *Shipley's and Terry's* actions violated Hall's rights, the court of appeals decided that the *City's* action did not violate Hall's rights, thereby deciding the merits of Hall's claims. The court of appeals decided a question that was not actually before it. The appellate court's action violated the separability requirement of the collateral order doctrine because the appellate court did not consider the question whether *Shipley and Terry* violated Hall's rights – by *allowing* the release of the file – in a manner that was "truly collateral" to the question whether the *City* violated Hall's rights – by *releasing* the file. *Johnson*, 515 U.S. at 311.

## I. THE COURT OF APPEALS HAS DECIDED AN IMPORTANT QUESTION OF FEDERAL LAW THAT HAS NOT BEEN, BUT SHOULD BE, SETTLED BY THIS COURT.

This Court held in *Johnson* that courts of appeals do not have jurisdiction over appeals from the denial of qualified immunity if the basis of the order is that a question exists as to whether there is sufficient evidence to support an allegation of constitutional violation. In *Behrens v. Pelletier*, 516 U.S. 299 (1996), the Court narrowed the holding in *Johnson* to apply only to questions of "whether the evidence could support a finding that particular conduct occurred," approving the appealability of orders which "resolve a dispute concerning an 'abstract issu[e] of law' . . . typically, the issue whether the federal right allegedly infringed was 'clearly established,'" because orders of the former kind do not satisfy the

separability requirement of the collateral order doctrine under *Cohen* and *Mitchell*. 516 U.S. at 313. "Notwithstanding the decisions of *Johnson* and *Behrens*, the courts still seem to be in somewhat disarray as to the proper rules to follow." *Cunningham v. City of Wenatchee*, 345 F.3d 802, 808 (9th Cir. 2003), *cert. denied sub nom. Cunningham v. Perez*, 541 U.S. 1010 (2004).

In this case, Hall claims the release of his file placed him and his family at substantial risk of harm. The court of appeals decided that if Hall was at risk of harm, the cause was not the release of his file, but his own decision to grant media interviews.[4] App. 6. Petitioners disputed jurisdiction because of factual disputes over, *inter alia*, the cause of the harm. The court of appeals assumed jurisdiction without addressing the factual dispute issues and decided that "no constitutional violation occurred" ***"because"*** Hall engaged the media. App. 6. This Court has not settled the question of whether the **cause** of the injury which a plaintiff asserts to be the basis of a constitutional violation is a factual issue relating to whether conduct (placing petitioner at risk of harm) occurred, or an abstract legal issue relating to whether the right (Hall's right not to be placed at risk of harm) was clearly established. This Court should settle the question of whether pretrial orders finding a dispute about the cause of constitutional injury in qualified immunity cases involving municipal liability under §1983 should be included in that small class of collateral orders which are immediately appealable under the collateral order doctrines of *Cohen* and *Mitchell*.

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[4] Petitioners contend that Hall's decision even to grant the interviews was driven by the conduct of the respondents, presenting a factual issue in itself. App. 14.

This Court in various contexts repeatedly has confirmed the importance and addressed the difficulty of assigning the proper characterization of an issue as legal or factual. *See, e.g., Thompson v. Keohane*, 516 U.S. 99, 99 (1995) (whether suspect is in custody for purpose of being entitled to *Miranda* warning is mixed question of law and fact); *Cooter and Gell v. Hartmax Corp.*, 496 U.S. 384, 401 (1990) (observing in rule 11 sanctions case that "The Court has long noted the difficulty of distinguishing between legal and factual issues."); *Miller v. Fenton*, 474 U.S. 104, 113 (1985) (distinction between questions of law and fact is "elusive" in 28 U.S.C. §2254(d) habeas corpus voluntariness of confession proceeding); *Wainwright v. Witt*, 469 U.S. 412, 429 (1985) (separation of fact questions from mixed law and fact questions difficult in 28 U.S.C. §2254(d) case); *Pullman-Standard v. Swint*, 456 U.S. 273, 288 (1982) (title VII employment discrimination case noting the "vexing nature of the distinction between questions of fact and questions of law"); *Baumgartner v. U.S.*, 322 U.S. 665, 671 (1944) (naturalization case).

In *Canton v. Harris*, 489 U.S. 378 (1989), a case involving municipal liability under §1983 for inadequate training of police, the Court addressed "the question whether there is a direct causal link between a municipal policy or custom and the alleged constitutional deprivation." 489 U.S. at 385-86. The *Canton* Court held this question to be a proof problem for the plaintiff, a "task for the fact finder," thereby suggesting it to be a fact question. 489 U.S. at 391 & n.12. Yet in *Board of County Commissioners of Bryan County v. Brown*, 520 U.S. 397 (1997), a split decision involving municipal liability under §1983 for inadequate screening of law enforcement employees, the majority opinion held that the plaintiff had not submitted

sufficient proof to establish the causal connection between the county's screening process before hiring a deputy and the deputy's later use of excessive force causing the plaintiff's constitutional injury. Justice Souter's dissent opined that the majority's reversal of the factual findings of causation in the lower courts transported the question from the realm of fact into the realm of law. 520 U.S. at 416. In *Collins v. Harker Heights*, 503 U.S. 115 (1992), a unanimous Court rejected the plaintiff's contention that the city had a constitutional duty to provide a safe work environment while at the same time suggesting plaintiff could establish the factual breach of duty and causation of injury elements necessary to establish ordinary tort liability under state law.

In sum, the Court has not squarely addressed the question of whether the causation issue in a case where the plaintiff asserts constitutional injury by being placed at substantial risk of harm from the execution of a municipal policy or custom under the state-created danger theory is a question of fact or a question of law for purposes of satisfying plaintiff's burden to demonstrate the link between the official policy or custom and plaintiff's injury. On the facts of this case, in light of our increasing awareness of the ongoing threats from foreign and domestic terror organizations to our citizens and the law enforcement personnel who are sworn to protect them, the Court should settle this question as soon as possible.

## II. THE COURT OF APPEALS HAS DECIDED AN IMPORTANT FEDERAL QUESTION IN A WAY THAT CONFLICTS WITH RELEVANT DECISIONS OF THIS COURT.

### A. The Court Of Appeals Decision Failed To Follow This Court's Decisions Requiring A Qualified Immunity Issue To Be Separate From The Merits Of The Action And Not Based On Factual Disputes To Be Appealable Before Trial.

This Court's decisions require qualified immunity interlocutory appeals to be separate from the merits of the action and free from factual disputes. *Johnson* held that a district court's determination of evidence sufficiency is not immediately appealable because (i) it is not a purely legal issue under *Mitchell*, (ii) it does not involve a decision separate from the merits of the case, and (iii) it is the wrong category of order for appealability because of (a) "considerations of delay," (b) "comparative expertise of trial and appellate courts," and (c) it is not a "wise use of appellate resources." 515 U.S. at 313-17. The district court in the case at Bar determined petitioners' evidence was sufficient to create a jury question of whether the policy or custom of the City was the cause of danger to Hall. App. 31-32. The district court did not believe that interlocutory appeal was appropriate in this case. App. at 40. The district court continued the trial, thereby indicating that the issues sought to be appealed were not truly collateral. *Id.*

*Behrens* held that a district court decision denying qualified immunity in the presence of a factual dispute is immediately appealable when it presents the purely legal issue of whether the facts taken in the light most favorable to plaintiff make out a constitutional deprivation. The

court of appeals did not view the facts in the light most favorable to petitioners when it decided the causation issue and reversed the district court on the merits of plaintiff's claims. The court of appeals decided that the conduct of the "city" (not of Shipley and Terry, the "officers" as required by *Katz*) was not the cause of the increased risk to Hall which lies at the heart of his constitutional deprivation claim. The error is twofold. First, by judging the conduct of the City instead of the conduct of the officers, the court of appeals assumed jurisdiction over a question that was not separate from the merits of the plaintiff's claim. Second, by deciding the issue of causation of plaintiff's injury, the court of appeals stepped outside the bounds of a purely legal issue and ventured into the factual realm.

Qualified immunity is a privilege to be free from certain claims enjoyed by governmental officers sued in their individual capacities whose conduct does not violate constitutional rights that have been clearly established at the time the officer performs the actions, and whose actions are reasonable under the circumstances. *Saucier v. Katz*, 533 U.S. 194, 200-02 (2001); *Mitchell v. Forsythe*, 472 U.S. 511, 526 (1985). Although municipalities are "persons" for purposes of §1983 liability and are liable if their policies or customs are the cause of a constitutional deprivation, *Monell*, 436 U.S. at 690-91; *Canton*, 489 U.S. at 385; *Harker Heights*, 503 U.S. at 120-21, qualified immunity is NOT a privilege belonging to a governmental entity. *Swint v. Chambers County Commission*, 514 U.S. 35, 43 (1995). By analyzing the actions of Shipley and Terry as the actions of the "city," App. at 4-5, the court of appeals did not separate the qualified immunity analysis that is required to decide petitioners' individual claims

against Shipley and Terry for deliberate indifference from the municipal liability analysis that is required to decide the merits of petitioner's case against the City for an unconstitutional policy or custom. *Johnson* and *Behrens* require this separation for jurisdiction to attach.

### B. The Court Of Appeals Decision Failed To Follow This Court's Decisions Prescribing The Qualified Immunity Appellate Jurisdiction Analysis.

*Saucier v. Katz* required the court of appeals to examine the conduct of the "officers" in deciding the qualified immunity question. Instead, the court of appeals examined the conduct of the "city." App. 4-5. In doing so, the court of appeals violated not only *Katz*, but also *Swint v. Chambers County Commission*, 514 U.S. 35 (1995).

In *Swint*, the plaintiffs sued individual police officers as well as the city and county government entities. The district court denied all defendants' motions for summary judgment; the officers' were on qualified immunity grounds. The individual defendants perfected interlocutory appeals, but the Eleventh Circuit rejected the County Commission's attempt to obtain review under the collateral order doctrine. Instead, the Eleventh Circuit decided the County Commission's appeal under pendent appellate jurisdiction. The *Swint* Court reversed, rejecting the County Commission's argument (and the Eleventh Circuit's position) that judicial economy justified appellate consideration of the merits of the plaintiffs' case against it. 514 U.S. at 45-49. The *Swint* Court compared 28 U.S.C. §1291 with 28 U.S.C. §1292(a) and 28 U.S.C. §1292(b) and observed that "Congress thus chose to confer on district courts first line discretion to allow interlocutory appeals."

514 U.S. at 47 & n.4. The district court in this case thought interlocutory appeal to be inappropriate. App. 40. The *Swint* Court opined that appellate court review conjunctively with *Cohen* collateral orders of rulings not independently reviewable would undermine congressional intent in prescribing the appellate jurisdiction of the lower courts. 514 U.S. at 47 & n.5. The *Swint* Court also noted that Congress' grant to the Supreme Court of rulemaking authority to expand the definition of "final" decisions under §1291 precluded circuit appellate court discretionary review in the absence of a Supreme Court rule. 514 U.S. at 48 & n.6.

In the case at Bar, the court of appeals *sub silentio* sought to economize the adjudication of this litigation utilizing the Eleventh Circuit's rationale in *Swint*. This Court should correct the court of appeals for the same reasons the Court corrected the Eleventh Circuit in *Swint*. The Sixth Circuit did not have the "city's conduct," i.e. the City's unconstitutional policy or custom of releasing law enforcement officer personnel files without prior notice and without regard to potential danger, properly before it.

The *Swint* Court left open for another day the question "whether or when it may be proper for a court of appeals, with jurisdiction over one ruling, to review, conjunctively, related rulings that are not themselves independently appealable." 514 U.S. at 50-51. This Court should settle the question whether the Sixth Circuit "properly" decided petitioners' claims against the "city" while assuming jurisdiction over the appeal of the "officers."

### C. The Court Of Appeals Decision Denied Petitioners The Fundamental Seventh Amendment Right To Jury Trial To Determine The Cause Of Danger To The Officer, In Conflict With This Court's Decisions Upholding The Seventh Amendment Right To Jury Trial Of Factual Issues And Of Causation Issues.

In *Johnson*, the unappealable district court order "resolved a fact-related dispute about the pre-trial record, namely, whether or not the evidence in the pretrial record was sufficient to show a genuine issue of fact for trial." *Johnson*, 515 U.S. at 307. In the case at Bar, the district court resolved in petitioners' favor the fact-related dispute about the sufficiency of the evidence to show a genuine issue for trial of the question whether the City's release of the information caused a substantial risk of harm to Hall.[5] By holding that "no constitutional violation occurred," the court of appeals essentially decided that, as a factual matter, the City's release of the information was not the cause of the substantial risk of harm to Hall.

This Court has held that "issues [in §1983 cases] that are proper for the jury must be submitted to it 'to preserve the right to a jury's resolution of the ultimate dispute,' as guaranteed by the Seventh Amendment." *City of Monterey v. Del Monte Dunes at Monterey, Ltd.*, 526 U.S. 687, 718 (1999), *quoting Markman v. Westview Instruments, Inc.*, 517 U.S. 370, 377 (1996); *see* U.S. Const., Seventh Amendment. The *Monterey* Court prescribed a three step process for determining if an issue in a §1983 case lies

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[5] Petitioners raised the right to jury trial at the court of appeals on page 24 of the brief of appellees, citing *Byrd v. Blue Ridge Elec. Co-op, Inc.*, 356 U.S. 525, 537-38 (1958).

within the province of the jury. First, the Court determines historically whether juries decided the issue, or similar issues, in the Seventh Amendment time frame. Second, the Court considers whether precedent has treated the issue as one for the jury. Finally, the Court considers whether functionality should dictate a jury determination. 526 U.S. at 718. In this case, history, precedent, and functional considerations all three support trial of the causation issue by jury.

In *Tennant v. Peoria & P. U. Ry. Co.*, 321 U.S. 29, 30 (1944), the Court "granted certiorari because of important problems as to petitioner's right to a jury determination of the issue of causation." The *Tennant* Court said

> It is not the function of a court to search the record for conflicting circumstantial evidence in order to take the case away from the jury on a theory that the proof gives equal support to inconsistent and uncertain inferences. The focal point of judicial review is the reasonableness of the particular inference or conclusion drawn by the jury. It is the jury, not the court, which is the fact-finding body. It weighs the contradictory evidence and inferences, judges the credibility of witnesses, receives expert instructions, and draws the ultimate conclusion as to the facts. The very essence of its function is to select from among conflicting inferences and conclusions that which it considers most reasonable. *Washington & Georgetown R. Co. v. McDade*, 135 U.S. 554, 571, 572, 10 S.Ct. 1044, 1049, 34 L.Ed. 235; *Tiller v. Atlantic Coast Line R. Co., supra*, 318 U.S. 68, 63 S.Ct. 451, 143 A.L.R. 967; *Bailey v. Central Vermont Ry.*, 319 U.S. 350, 353, 354, 63 S.Ct. 1062, 1064, 87 L.Ed. 1444. That conclusion, whether it relates to negligence, *causation* or any other factual matter, cannot be ignored. Courts

> are not free to reweigh the evidence and set aside the jury verdict merely because the jury could have drawn different inferences or conclusions or because judges feel that other results are more reasonable.

*Tennant v. Peoria & P. U. Ry. Co.*, 321 U.S. 29, 35 (1944) (emphasis added).

The causation requirement is set out in §1983, and that issue was treated as a jury issue in *City of St. Louis v. Proprotnik*, 485 U.S. 112 (1988), where the issue was whether a jury instruction on the authority of a city officer to speak for official city policy was proper.

> For our purposes here, the crucial terms of the statute are those that provide for liability when a government "subjects [a person], or *causes* [that person] to be subjected," to a deprivation of constitutional rights.

*City of St. Louis v. Praprotnik*, 485 U.S. 112, 122 (1988) (emphasis added).

In *Gallick v. Baltimore & O. R. Co.*, 372 U.S. 108, 109 (1963), the Court examined a long line of cases dealing with the issue of the right to jury trial on causation issues in reversing a decision of the Ohio Court of Appeals for invading the province of the jury by taking away the issue of causation. In *Dimick v. Schiedt*, 293 U.S. 474 (1935), the Court declared: "Maintenance of the jury as a fact-finding body is of such importance and occupies so firm a place in our history and jurisprudence that any seeming curtailment of the right to a jury trial should be scrutinized with the utmost care." *Dimick v. Schiedt*, 293 U.S. 474, 486 (1935); *see also Washington & Georgetown R. Co. v. McDade*, 135 U.S. 554, 571-72 (1890) (questions of competing cause

factors of negligence or contributory negligence must be decided by a jury); *Sioux City & P. R. Co. v. Stout*, 84 U.S. 657, 663-64 (1873) (even when facts are not in dispute, the inference to be drawn from those facts can be a jury question).

The court of appeals said: "*Because* he engaged the media, and in doing so released virtually all of the information released by the City through his personnel file, *there was no increased risk* to Hall or his family based *solely* on the release of his personnel file." App. 6 (emphasis added). Thus, the court of appeals decided this *causation* issue and thereby invaded the province of the jury.

The court of appeals opinion assumed that Hall was at substantial risk of harm due to the presence of his personally identifying information in the public view. The court of appeals then weighed the two competing factors as to what caused this risk of harm: was it the release of his file? Or his own penchant for media attention? The court of appeals concluded that it was Hall's decision to "engage[] the media" that caused the risk of harm, not "solely . . . the release of his personnel file." The court of appeals, therefore, decided the causation of the risk of harm to Hall by choosing between two competing causes. This decision violated the petitioners' right to jury trial in contravention of the Seventh Amendment and a long line of decisions of this Court.

## CONCLUSION

Most qualified immunity cases arise in the context of a citizen alleging that a law enforcement or other governmental officer violated the citizen's constitutional rights.

This case differs from the usual, because this case involves a law enforcement officer's claim that his employers violated the law enforcement officer's constitutional rights. Most of the cases deciding the question of qualified immunity have the goal of protecting the law enforcement officer in the performance of his duty. *E.g.*, *Saucier v. Katz*, 533 U.S. 194 (2001) (military police officer entitled to qualified immunity against excessive force claim); *Anderson v. Creighton*, 483 U.S. 635 (1987) (FBI agent protected by qualified immunity from warrantless search claim if reasonable officer could have believed search to be lawful). The manner in which the court of appeals has decided this case, however, will have the effect of continuing and increasing rather than reducing the jeopardy that law enforcement officers face in the performance of their duties. The government has an interest in securing the employment of officers to enforce the law. The government's interest in securing competent law enforcement officers will be advanced if prospective employees need not worry about unnecessarily compromising the safety of themselves and their families by accepting the employment. Therefore, the writ should be granted.

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NOT RECOMMENDED FOR FULL – TEXT PUBLICATION

Nos. 04-6133/04-6307

**UNITED STATES COURT OF APPEALS**
FOR THE SIXTH CIRCUIT

ERIC HALL and wife LISA HALL, individually and as next friends on behalf of the minor children, JANE DOE 1, JANE DOE 2, and JANE DOE 3,

Plaintiffs-Appellees,

v.

CITY OF COOKEVILLE, TENNESSEE,

Defendant,

BOB TERRY, in his individual capacity; JIM SHIPLEY, in his individual capacity,

Defendants-Appellants,

STATE OF TENNESSEE,

Intervening Defendant-Appellant.

_____/

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF TENNESSEE

(Filed Nov. 10, 2005)

Before: MARTIN, NELSON, and ROGERS, Circuit Judges.

BOYCE F. MARTIN, JR., Circuit Judge. Bob Terry, the Chief of Police of Cookeville, Tennessee and City Manager Jim Shipley appeal the district court's denial of their request for qualified immunity based on their roles in the release of Eric Hall's personnel file to the public. For the following reasons, we REVERSE the district court's

judgment and hold that both Terry and Shipley are entitled to qualified immunity. We further conclude that we lack appellate jurisdiction to hear Tennessee's appeal.

## I.

On New Year's Day 2003, the Smoak family was pulled over on Interstate 40 by the Tennessee Highway Patrol under suspicion of committing armed robbery after a woman reported seeing money flying from their car. As the family of three was kneeling on the pavement, being handcuffed by the officers, the family dog, Patton, leapt out of the car and wagging his tail began moving towards Officer Eric Hall of the Cookeville Police Department. Officer Hall discharged his shotgun at Patton when he was approximately a foot away, killing Patton instantly.[1] The officers later discovered that Mr. Smoak had merely left his wallet atop the car after leaving a gas station and his money blew away. The entire traffic stop was taped and the video gained international notoriety.

After this highly-publicized event, Hall became the subject of intense media attention. Following a meeting with Shipley, Hall's attorney, and others, Hall agreed to be interviewed by a reporter from a Nashville news station on January 9th. In order to bolster Hall's appearance in the interview, the City released portions of his personnel file relating to Hall's disciplinary actions and commendations to the reporter. The record is unclear whether this release was done with Hall's knowledge or consent.

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[1] This marked the third time in five years that Hall shot a dog while on duty.

On January 10th, in response to media requests, the Putnam County Tax Assessor's office released copies of tax records which contained Hall's name, his wife's name, and their address. On that same day, print and television news media contacted the City and requested copies of Hall's personnel file. The administrative assistant to City Manager Shipley, Gail Fowler, received this request, made the redactions she felt were required by law, and distributed copies to the press. Also on January 10th, the Cookeville Police Department received an anonymous tip stating that the Animal Liberation Front was threatening to put a contract out on Hall's life. This threat was relayed to the Federal Bureau of Investigation, and the City of Cookeville arranged for Hall's family to be temporarily moved to Gatlinburg, Tennessee.

On January 16th, the City complied with a request from Geoffrey Davidian to obtain a copy of Hall's personnel file. Davidian operates the website "The Putnam Pit," with commentary on current events in Putnam County. After obtaining the redacted personnel file, Davidian posted portions of the personnel file on his web site. The file given to the media in both instances contained Hall's parents's names, his wife's name, his oldest child's name and date of birth, and Hall's driver's license, fingerprints, birth certificate, college transcript, and social security number (although it was not identified as such).

Without knowledge of the release of his personnel file, Hall agreed to an interview for a local radio station and agreed to be the subject of a segment on NBC's "Today Show." The segment was taped in Hall's attorney's office, a city park, and at Hall's home, a portion of which showed his children playing in the snow outside of the home. The segment was broadcast on January 21st. On or about

January 27th, Hall learned that "The Putnam Pit" had received a copy of his redacted personnel file.

Hall filed this lawsuit on August 27th in the Middle District of Tennessee alleging that Shipley and Terry violated Hall's right to Due Process and right to privacy under the federal Constitution, and his right to privacy under the Tennessee Constitution. Additionally, Hall alleged that the Tennessee Open Records Act, T.C.A. § 10-7-503(c)(1) violates the federal Constitution as well as the Tennessee state constitution. The State of Tennessee intervened as a defendant in order to defend the statute.

On April 29, 2004, Shipley and Terry, in their individual capacities, moved for summary judgment based on qualified immunity. On April 2, 2004, the State of Tennessee moved for partial summary judgment as to the constitutionality of Tennessee's Open Records Act. The District Court denied both motions and all three parties now appeal.

## II.

This Court reviews a district court's denial of qualified immunity *de novo*. *Klein v. Long*, 275 F.3d 544, 550 (6th Cir. 2001). Under the doctrine of qualified immunity, "government officials performing discretionary functions generally are shielded from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982). The qualified immunity analysis generally entails three steps. First, the district court must consider whether the facts, taken in the light most favorable to the party asserting the injury, show that the city's

conduct violated a constitutional right. *Saucier v. Katz*, 533 U.S. 194, 201 (2001). If the facts alleged are sufficient to establish a constitutional violation, then this Court must determine whether the particular right allegedly violated was clearly established at the time the violation occurred. *Id.* Third, this Court must determine whether the actions taken were "objectively unreasonable in light of the clearly established constitutional rights." *Bennett v. City of Eastpointe*, 410 F.3d 810, 819 (6th Cir. 2005).

The right alleged by Hall in this case stems from this Court's holding in *Kallstrom v. City of Columbus*, 136 F.3d 1055 (6th Cir. 1998). In that case, the City of Columbus released the personnel and pre-employment files of three of the city's undercover police officers. *Id.* at 1059. The files included the officers's addresses and phone numbers, their immediate family's names, addresses, and phone numbers, their social security numbers, and copies of their driver's licenses. The city gave those files to the defense counsel in a trial at which the officers were to testify. *Id.* This Court held that the officers' right to privacy ensured a fundamental liberty interest in "preserving their lives and the lives of their family members, as well as preserving their personal security and bodily integrity." *Id.* at 1062. "[W]here the release of private information places an individual at substantial risk of serious bodily harm, possibly even death, from a perceived likely threat, the 'magnitude of the liberty deprivation . . . strips the very essence of personhood.'" *Id.* at 1064 (quoting *Doe v. Claiborne County Bd. of Educ.*, 103 F.3d 495, 506-07 (6th Cir. 1996)). Additionally, this Court held

> [t]he procedural component of the Fourteenth Amendment's Due Process Clause, however, at a minimum requires that the City notify the officers

> of a request for their addresses, phone numbers, and driver's licenses, and the names, addresses, and phone numbers of their family, prior to releasing this information so that they may have the opportunity to invoke their constitutionally protected rights to privacy and personal security.

*Kallstrom,* 136 F.3d at 1067.

Because the denial of qualified immunity came at the summary judgment phase, this Court must make all factual assumptions in favor of Hall, the non-moving party. Fed. R. Civ. P. 56(c). Despite those assumptions, however, we conclude no *Kallstrom* constitutional violation occurred based on the particular facts in this case. Hall's penchant for media attention led to the voluntary release of his personal information into the public eye. Because he engaged the media, and in doing so released virtually all of the information released by the City through his personnel file, there was no increased risk to Hall or his family based solely on the release of his personnel file. Also, in order to hold a supervisor liable under section 1983, the supervisor must have condoned, encouraged, or knowingly acquiesced in the alleged misconduct. *Bennett,* 410 F.3d at 823 Hall has been unable to show any facts which demonstrate how Terry or Shipley condoned, encouraged, or knowingly acquiesced in the release of that information in Hall's personnel file not already released by Hall in his public appearances. At best, Shipley could be considered reckless in his role, but this does not rise to the necessary level of malfeasance for supervisor liability to attach. *See Nishiyama v. Dickson County,* 814 F.2d 277, 284-85 (6th Cir. 1987). For these reasons, no constitutional violation occurred and, therefore, analysis of steps two and three of the qualified immunity test is unnecessary.

III.

The second appeal in this case is the State of Tennessee's claim that the district court erred in denying its motion for summary judgment regarding Hall's challenge of the constitutionality of Tenn. Code Ann. § 10-7-503(c)(1). Tennessee has stipulated that its appeal does not fall within this Court's original appellate jurisdiction and, therefore, relies on our pendent appellate jurisdiction. In order for pendent appellate jurisdiction to apply, the pendent case must be "inextricably intertwined" with the original appeal. *Swint v. Chambers County Commission,* 514 U.S. 35, 51 (1995); *Mattox v. City of Forest Park,* 183 F.3d 515, 523-24 (6th Cir. 1999). Nothing in Tennessee's brief or oral argument demonstrates how its appeal on the constitutionality of a statute is inextricably intertwined with Shipley's and Terry's appeal on the subject of qualified immunity. The inquiries of the two appeals are extremely different and they can not be considered coterminous because the outcome of one appeal has no bearing on the outcome of the other. *See Mattox,* 183 F.3d at 523-24. Therefore, we conclude that we do not have pendent appellate jurisdiction and dismiss the appeal.

IV.

For the reasons stated above, we REVERSE the judgment of the district court and hold that Shipley and Terry are entitled to qualified immunity. We DISMISS Tennessee's appeal for lack of jurisdiction.

**IN THE UNITED STATES DISTRICT COURT**
**FOR THE MIDDLE DISTRICT OF TENNESSEE**
**NASHVILLE DIVISION**

ERIC HALL and wife, LISA HALL individually and as next friends on behalf of the minor children. JANE DOE 1 JANE DOE 2, JANE DOE 3.

Plaintiffs.

v.

CITY OF COOKEVILLE, TENNESSEE BOB TERRY, individually and in his official capacity as Chief of Police, Cookeville Police department, and JIM SHIPLEY, individually and in his official capacity as City Manager, City of Cookeville, Tennessee,

Defendants

and

STATE OF TENNESSEE,

Intervening Defendant.

NO. 2:03-0089
JUDGE HAYNES

**ORDER**

In accordance with the Memorandum filed herewith, the motion for summary judgment (Docket No.18) filed by the Defendants, City of Cookeville, Shipley and Terry and the motion for summary judgment filed by the Defendants Shipley and Terry (Docket Entry No. 49) are **DENIED** except as to Plaintiffs claims concerning the Defendants' failure to cooperate and that claim is **DISMISSED with**

**prejudice**. The State Attorney General's motion for partial summary judgment (Docket Entry No.30) is **DENIED**.

The trial is **CONTINUED** pending further Order of the Court.

It is so **ORDERED**.

**ENTERED** this the 24th day of August, 2004.

/s/ William J. Haynes, Jr.
WILLIAM J. HAYNES, JR.
United States District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF TENNESSEE
NASHVILLE DIVISION

| | |
|---|---|
| ERIC HALL and wife, LISA HALL individually and as next friends on behalf of the minor children. JANE DOE 1 JANE DOE 2, JANE DOE 3.<br><br>Plaintiffs,<br><br>v.<br><br>CITY OF COOKEVILLE, TENNESSEE BOB TERRY, individually and in his official capacity as Chief of Police, Cookeville Police department, and JIM SHIPLEY, individually and in his official capacity as City Manager, City of Cookeville, Tennessee,<br><br>Defendants<br><br>and<br><br>STATE OF TENNESSEE,<br><br>Intervening Defendant. | NO. 2:03-0089<br>JUDGE HAYNES |

**MEMORANDUM**

Plaintiffs, Eric Hall, Lisa Hall and their children, filed this action under 42 U.S.C. § 1983 against the Defendants: City of Cookeville, Robert Terry, Cookeville's Police chief in his official and individual capacities and Jim Shipley, Cookeville's City Manager in his official and individual capacities. Plaintiffs assert claims that the Defendants violated their Fourteenth Amendment due process rights

to privacy by releasing redacted portions of Eric Hall's personnel file to the media after a highly publicized event in which Eric Hall, a Cookeville police officer, shot and killed a dog. Plaintiffs also assert claims that the Defendants failed to cooperate with the Federal Bureau of Investigation ("FBI") in an investigation of alleged threats received by Eric Hall and the City. Eric Hall [sic] claims include that the Defendants retaliated against Eric Hall[1] as well as Plaintiffs' privacy claims under the Tennessee Constitution and a challenge to Tennessee Open Records Act, Tenn. Code Ann. § 10-7-501 *et seq.*

Before the Court are the Defendants, City of Cookeville's, Shipley's and Terry's motion for summary judgment (Docket Entry No. 18) contending, in sum, (1) that neither the City nor the individual Defendants in their official capacities violated Plaintiffs' rights in releasing redacted personal information from Eric Hall's city employment file; (2) that Eric Hall consented to the City's disclosures; (3) that Hall participated in several television interviews that disclosed more personal information about him and his family than did the Defendants and such conduct constitutes a waiver of Plaintiffs' rights to privacy; and (4) that the Tennessee Open Records Act statute is constitutional.

Defendants Terry and Shipley filed a second motion for summary judgment (Docket Entry No. 49) contending as to Plaintiffs' claims against them in their individual capacities: (1) that neither defendant actually disclosed the contested information about Eric Hall; (2) that they are entitled to qualified immunity; and (3) that under the

[1] Plaintiff Eric Hall recently stipulated to a dismissal of his retaliation claim.

facts, the disclosure of redacted information about Eric Hall's employment, did not violate his privacy rights.

The State Attorney General has filed a motion for partial summary judgment (Docket Entry No. 30) contending that the Tennessee Open Records Act authorizing disclosure of information on city employees with exceptions for certain personal information is constitutional.

Plaintiffs responded to each motion (Docket Entry Nos. 36, 52, 53 and 56). In sum, Plaintiffs assert material factual disputes about the Defendants' releases of the redacted information. Plaintiffs contend that the Defendants' disclosures included personal information about Hall's family in violation of clearly established Sixth Circuit precedent. In addition, Plaintiffs assert that their challenge to the constitutionality of certain provisions of the Tennessee Open Records Act, requires a complete factual record to be developed at trial.

For the reasons set forth below, the court first concludes that Sixth Circuit precedent clearly establishes the Plaintiffs' right in this context. The Court further concludes that material factual disputes exist on Plaintiffs' due process claims as to: (1) whether Shipley authorized the public disclosures from Hall's personnel file; (2) whether Hall was given prior notice and consented to the City's first disclosure of his redacted personnel file; (3) whether the redacted information made publicly available by the Defendants created a substantial risk of harm to Hall and his family; and (4) whether the State has a compelling interest in the automatic disclosure of a law enforcement officer's driver's license that contains some personal information. Plaintiffs' claims for the Defendants'

alleged lack of cooperation with the FBI fails as a matter of law.

## A. Review of the Record[2]

On January 1, 2003, Eric Hall, a police officer with the Cookeville Police Department responded to a dispatch to assist members of the Tennessee Highway Patrol ("THP") in a traffic stop on Interstate 40 near Cookeville. The THP officers stopped a vehicle upon a suspicion of robbery based upon currency floating on the interstate. The occupants of the vehicle were the Smoak family from North Carolina and the father's wallet had been left on top of the vehicle after their last stop. The money on the interstate may have been from his wallet. When Eric Hall arrived, the Smoak family members were outside the vehicle. (Docket Entry No. 27, Attachment No. 6, Videotape). A small dog came out of the Smoak's vehicle apparently wagging its tail and approaching Hall, who, fearing an attack fired two shots and killed the dog. *Id.*

The THP later released a videotape showing Eric Hall shooting and killing the dog. On January 8, 2003, several

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[2] Upon a motion for summary judgment, the factual contentions are viewed in the light most favorable to the party opposing the motion for summary judgment. *Duchon v. Cajon Co.*, 791 F.2d 43, 46 (6th Cir. 1986). As will be discussed *infra*, upon the filing of a motion for summary judgment, the opposing party must come forth with sufficient evidence to withstand a motion for directed verdict, *Anderson v. Liberty Lobby*, 477 U.S. 242, 247-52 (1986), particularly where there has been an opportunity for discovery. *Celotex Corp. v. Catrett*, 477 U.S. 317 (1986). From a review of the record, the Court concludes that there are material factual disputes. Thus, the section does not constitute a finding of facts under Fed.R.Civ.P. 56(d).

media reporters requested copies of Eric Hall's personnel file under Tennessee's Open Records Act.

**1. The Disclosures**

According to Shipley and Gail Fowler, Shipley's administrative assistant, prior to Hall's first interview with the media on January 9, 2003, they met with Hall and Shawn Fry, Hall's attorney as well as Michael O'Mara, the City's attorney to discuss the release of redacted information from Hall's personnel file to a member of the media who requested the information. (Docket Entry No. 19, Shipley Affidavit at. p. 2 and Docket Entry No. 20, Fowler Affidavit at p. 2). Nick Beres, a Channel 5 News reporter, was the first reporter who requested Hall's file and was interested in any disciplinary actions against Hall.

According to Shipley and Crawford [sic], neither Hall nor his counsel objected to the redacted disclosures. Shawn Fry, Hall's counsel, however, disputes that he met with City officials prior to Hall's first media interview on January 9th about what records from Hall's personnel filed [sic] would be released to the media. (Docket Entry No. 24, Attachment No. 9, Fry Deposition at p.18). Fry talked with Mike McCloud, a media consultant hired by the City prior to Hall's first media interview. *Id* at 19-20. Fry was also aware that the first reporter, Nick Beres with Channel 5 of Nashville, had "items" from Hall's personnel file at Hall's interview with Hall. *Id.* at 19. Based upon his discussions with his counsel, the Defendant Terry and his police captain, Hall agreed to the first interview with Nick Beres of Channel 5 and that interview was on January 9, 2003.

At the same or another meeting, O'Mara, the Cookeville city attorney advised Hall and his counsel that his home address was also available from the Putnam County Tax Assessor's Office. (Docket Entry No. 2. O'Mara Affidavit at p.2; Docket Entry No. 19, Shipley's Affidavit: and Docket Entry No. 20, Fowler's Affidavit).

Gail Fowler, Shipley's administrative assistant, actually redacted portions of the personnel file and released those documents to the media. Fowler asserts that she redacted portions of Hall's personnel file that she felt were appropriate to the Tennessee Open Records Act and released the remaining redacted information to the media. (Docket Entry No. 20, Fowler's Affidavit at p. 2).

The redacted information excluded any reference to Eric Hall's home address, social security number and his parents' home telephone. (Docket Entry No. 18, Exhibit 11 thereto at p. 1). Yet, Lisa Hall's name and birthdate and Hall's daughter's name were not redacted nor were Eric Hall's parents' names and their work location. *Id.* Hall also objects to the disclosure of the following items from his personnel file:

- His date of birth;
- His wife's name and date of birth;
- His daughter's name and date of birth;
- His parents' names and work place;
- His listing of dependents on his 1999 W-4 form;
- His parents' birthplaces;
- His fingerprints;

- His police identification number and
- His photograph.

(Docket Entry No. 18, Exhibit 11 Attachment thereto).

The other portions of Eric Hall's disclosed files included his educational records and degree, training, letters of commendation, incident reports, evaluations and other job related matters. The disclosure of the redacted personnel record included a copy of his driver's license, with only his license number redacted. (Docket Entry No. 18 at Exhibit 11 at 00011). Yet, the "audit no" on Hall's driver's license is his social security number. *Id.*

The Defendant Terry asserts that he was not involved in releasing Eric Hall's personnel records, (Docket Entry No. 21, Terry Affidavit). Terry asserts that the City's policy is that "human resources and city hall" are responsible for disclosure of City employee records. (Docket Entry No. 36, Terry Deposition at p.94). As discussed *infra*, state law expressly lists the chief law enforcement officer as maintaining police officers' records and as making the assessment of danger to the officer by public release of the officer's the [sic] personnel information.

Although Shipley denies that he released Hall's personnel records, (Docket Entry No. 19, Shipley Affidavit at p. 3); Hall cites Shipley's testimony that he attended a meeting to discuss the disclosure of Eric Hall's personnel file with redactions because Shipley wanted to show the media that Hall is "a good officer." (Docket Entry No. 36, Attachment No. 2, Shipley Deposition at pp. 64-65, 77, 79). Hall also cites Fowler's testimony that the decision at the meeting with Shipley, about disclosure of Hall's personnel

file, was a collective decision. *Id.* at Attachment No. 11, Fowler Deposition at p. 20.

On January 10th, in response to requests by other members of the media, the Putnam County Tax Assessor's office released copies of its records that revealed the home address of Hall and his wife, Lisa Hall, (Docket Entry No. 18, Attachment No. 6, Hall Deposition at pp. 136-37). That same day, *The Knoxville New Sentinel* and WATE TV requested and received copes [sic] of Hall's redacted personnel file from the City Administrator. *Id.*, at pp. 139-40. The City failed to provide Hall with the prior notice of those requests and disclosure by city officials. Hall initially did not raise an objection to the release of these records. *Id.* at pp. 139-142.

Hall also cites a letter, from Michael O'Mara, Cookeville's attorney to Shipley as City Manager, about the Sixth Circuit's opinion in *Kallstrom v. City of Columbus*, 136 F.3d 1050 (6th Cir. 1991) (Docket Entry No. 53, Exhibit 18 Attached thereto).[3] The letter mentions the segregation of all law enforcement personnel records and an individual assessment of each record before responding to any request to disclose those records. To evaluate the risk of disclosure to the officer, the police department was to make the assessment of that risk. *Id.* O'Mara wrote:

> If an inquiry of this nature were made, the human resources department should be able *to*

[3] The document was attached to Plaintiffs' response that is labeled as an exhibit to a deposition. (Docket Entry No. 36). Defendant object [sic] to this letter on the basis of attorney client privilege. Yet, with this disclosure to Plaintiffs' counsel, any privilege is waived. *Tennessee Laborers Health & Welfare Fund v. Columbia HCA Corp.*, 293 F.3d 289, 303, 306 (6th Cir. 2002).

> *call the police department and ask for a determination by the police department as to whether the officer was involved in a job assignment which would increase the risk of harm to the police officer or his family.* In most instances this would be an assignment to perform under cover work or investigative work that involved a violent criminal element.
>
> *If the police department determined that the job assignment was of a high risk nature, then that information could be relayed to the human resources department when an inquiry was made.* The human resource department could then advise the person requesting access that access would not be granted until the human resources department could conduct a hearing as to the factors listed in the Attorney General's Opinion and the *Kallstrom* decision.

*Id.* (emphasis added.)

In a later memorandum to Defendant Terry, O'Mara advised Terry that the City should engage in the "balancing test" or disclosure in accordance with *Kallstrom*. The liaison from the police department is not mentioned in this latter memorandum and there is no cited proof that Shipley or the O'Mara discussed with Terry, the assignment of a liaison officer from the City police department.

**2. The Interviews**

During these events, Hall gave a series of television, radio and newspaper interviews giving his version of the shooting of the dog and the event's impact on him and his family. The first interview was with Channel 5 News in Nashville. Hall's second interview was on the Today Show

that included a picture of his home. There was also a radio interview.

On February 9, 2003, Hall gave another interview to a reporter with *The Hearld-Citizen*, a newspaper published and circulated in Putnam County, Tennessee. (Docket Entry No. 18 at Attachment No. 14). This newspaper article included, a photograph of Hall; his wife's name reference to his birthplace; that he was born in Anderson, Indiana; that his father and grandparents were natives of Fentress Country; that his sister worked at Fleeguard; as well as the fact that Hall had three daughters and their ages. *Id.*

**3. The Threats**

In addition to the City's disclosures, the Putnam County Tax Assessor's office released copies of its records that showed home address and names of Hall and his wife, Lisa Hall. (Docket Entry No. 24, Hall Deposition at pp. 135-37). Sometime thereafter, member(s) of the news media were at the Hall's residence. Hall's mother reported the media's presence to Hall and stated that the media were terrorizing her and Hall's three children. David Andrews, the Putnam County Sheriff responded to a report about the media at the Hall's residence. (Docket Entry No. 23, Andrews Affidavit). Andrews spoke to news reporter(s) who were present, but did not observe any threatening conduct and left the area. *Id.* It is asserted that Eric Hall did not go to his home in response to his mother's call. The defendants assert that this event occurred before any of disclosures by City officials of Hall's personnel records.

According to Terry, the Cookeville Police Department, received hate mail about Hall's shooting of the dog. (Docket Entry No. 21, Terry Affidavit at p. 2). Terry did not deem any of these as posing an "actionable threat" against Hall. On January 10th, the Cookeville Police Department received a telephone call from a person who reported that he had contacts with the Animal Liberation Front ("ALF") that was going to put a "bounty" on Eric Hall. *Id.* at p. 2. Within an hour, Terry asserts that he reported the threat to the Federal Bureau of Investigation ("FBI"). *Id.* The FBI later told Terry that the ALF call was not an "actionable threat" for prosecution purposes. *Id.* at p. 3. This is a disputed statement of Darrell Martin of the FBI, who characterized the City as cooperative in the investigation of these threats.

It is asserted that Hall was aware of hate mail that was sent to the city's offices about him. Hall also received hate mail on his personal computer at the police department and gave that mail to the FBI. (Docket Entry No. 24, Hall deposition at p. 155). Hall also states that he reported these latter threats to the Cookeville Police Department's front office. Yet, the Defendants assert that these documents were not delivered to them at the time nor during pretrial discovery.

Eric and Lisa Hall specifically objected to the release of Hall's personnel file to The Putnam Pit – because of that publication's propensity of publishing information on the Internet in an effort to stir up public controversy against the City of Cookeville and its employees. Since approximately 1995, The Putnam Pit has been using Tennessee's Open Records Act to harass the city employees. (Docket Entry No. 36, Attachment Nos. 3-5, 7). Gary Boutwell, Plaintiffs' expert cites the City's disclosure of Hall's redacted

personnel file to the Putnam Pit as increasing the risks to the personal safety of Hall and his family.

**B. Conclusions of Law**

"The very reason of the summary judgment procedure is to pierce the pleadings and to assess the proof in order to see whether there is a genuine need for trial." Advisory Committee Notes on Rule 56, Federal Civil Judicial Procedure and Rules (West Ed. 1989). Moreover, "district courts are widely acknowledged to possess the power to enter summary judgment *sua sponte* so long as the opposing party was on notice that she had to come forward with all of her evidence." *Celotex Corp. v. Catrett*, 477 U.S. 317, 326 (1986). *Accord*, *Routman v. Automatic Data Processing, Inc.*, 873 F.2d 970, 971 (6th Cir. 1989).

In *Anderson v. Liberty Lobby. Inc.*, 477 U.S. 242 (1986), the United States Supreme Court explained the nature of a motion for summary judgment:

> Rule 56(c) of the Federal Rules of Civil Procedure provides that summary judgment 'shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.' By its very terms, this standard provides that the mere existence of *some* alleged factual dispute between the parties will not defeat an otherwise properly supported motion for summary judgment; the requirement is that there be no *genuine* issue of *material* fact.
>
> *As to materiality, the substantive law will identify which facts are material. Only disputes*

> *over facts that might affect the outcome of the suit under the governing law will properly preclude the entry of summary judgment.* Factual disputes that are irrelevant or unnecessary will not be counted.

477 U.S. at 247-48 (emphasis in the original and added in part). Earlier the Supreme Court defined a material fact for Rule 56 purposes as "[w]here the record taken as a whole could not lead a rational trier of fact to find for the nonmoving party, there is no 'genuine issue for trial.'" *Matsushita Electrical Industrial Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986) (citations omitted).

A motion for summary judgment is to be considered after adequate time for discovery. *Celotex Corp. v. Catrett*, 477 U.S. 317, 326 (1986). Where there has been a reasonable opportunity for discovery, the party opposing the motion must make an affirmative showing of the need for additional discovery after the filing of a motion for summary judgment. *Emmons v. McLaughlin*, 874 F.2d 351, 355-57 (6th Cir. 1989). *But see Routman v. Automatic Data Processing, Inc.*, 873 F.2d 970, 971 (6th Cir. 1989).

There is a certain framework in considering a summary judgment motion as to the required showing of the respective parties as described by the Court in *Celotex*

> Of course, a party seeking summary judgment always bears the initial responsibility of informing the district court of the basis for its motion, and identifying those portions of "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any," which it believes demonstrate the absence of a genuine issue of material fact. . . . [W]e find no express or implied requirement in Rule 56

> that the moving party support its motion with affidavits or other similar materials negating the opponent's claim.

*Celotex*, 477 U.S. at 323 (emphasis deleted).

As the Court of Appeals explained, "[t]he moving party bears the burden of satisfying Rule 56(c) standards." *Martin v. Kelley*, 803 F.2d 236, 239, n. 4 (6th Cir. 1986). The moving party's burden is to show "clearly and convincingly" the absence of any genuine issues of material fact. *Sims v. Memphis Processors, Inc.*, 926 F.2d 524, 526 (6th Cir. 1991) (quoting *Kochins v. Linden-Alirnak, Inc.*, 799 F.2d 1128, 1133 (6th Cir. 1986)). "So long as the movant has met its initial burden of 'demonstrating the absence of a genuine issue of material fact,' the nonmoving party then 'must set forth specific facts showing that there is a genuine issue for trial.'" *Emmons v. McLaughlin*, 874 F.2d 351, 353 (6th Cir. 1989) (quoting *Celotex* and Rule 56(e)).

Once the moving party meets its initial burden, the Sixth Circuit warned that "[t]he respondent must adduce more than a scintilla of evidence to overcome the motion [and] . . . must 'present affirmative evidence in order to defeat a properly supported motion for summary judgment.'" *Street v. J.C. Bradford & Co.*, 886 F.2d 1472, 1479 (6th Cir. 1989) (quoting *Liberty Lobby*). Moreover, the Court of Appeals explained that:

> The respondent must 'do more than simply show that there is some metaphysical doubt as to the material facts.' Further, '[w]here the record taken as a whole could not lead a rational trier of fact to find' for the respondent, the motion should be granted. The trial court has at least some discretion to determine whether the respondent's claim is 'implausible.'

*Street*, 886 F.2d at 1480 (cites omitted). See also *Hutt v. Gibson Fiber Glass Products*, 914 F.2d 790, 792 (6th Cir. 1990) ("A court deciding a motion for summary judgment must determine 'whether the evidence presents a sufficient disagreement to require a submission to the jury or whether it is so one-sided that one party must prevail as a matter of law") (quoting *Liberty Lobby*).

If both parties make their respective showings, the Court then determines if the material factual dispute is genuine, applying the governing law.

> More important for present purposes, *summary judgment will not lie if the dispute about a material fact is 'genuine' that is if the evidence is such that a reasonable jury could return a verdict for the nonmoving party.*
>
> * * *
>
> Progressing to the specific issue in this case, we are convinced that *the inquiry involved in a ruling on a motion for summary judgment or for a directed verdict necessarily implicates the substantive evidentiary standard of proof that would apply at the trial on the merits.* If the defendant in a run-of-the-mill civil case moves for summary judgment or for a directed verdict based on the lack of proof of a material fact, the *judge must ask himself not whether he thinks the evidence unmistakably favors one side or the other but whether a fair-minded jury could return a verdict for the plaintiff on the evidence presented.* The mere existence of a scintilla of evidence in support of the plaintiff's position will be insufficient: there must be evidence on which the jury could reasonably find for the plaintiff. *The judge's inquiry, therefore, unavoidably asks whether reasonable jurors could*

> *find by a preponderance of the evidence that the plaintiff is entitled to a verdict – 'whether there is [evidence] upon which a jury can properly proceed to find a verdict for the party producing it, upon whom the onus of proof is imposed.'*

*Liberty Lobby*, 477 U.S. at 248, 252, 106 S. Ct. 2505, 91 L.Ed.2d at 211-212, 214 (citation omitted and emphasis added).

It is likewise true that:

> [I]n ruling on a motion for summary judgment, the court must construe the evidence in its most favorable light in favor of the party opposing the motion and against the movant. Further, the papers supporting the movant are closely scrutinized, whereas the opponent's are indulgently treated. It has been stated that: 'The purpose of the hearing on the motion for such a judgment is not to resolve factual issues. It is to determine whether there is any genuine issue of material fact in dispute. . . .'

*Bohn Aluminum & Brass Corp. v. Storm King Corp.*, 303 F.2d 425, 427 (6th Cir. 1962) (citation omitted). As the Court of Appeals stated, "[a]ll facts and inferences to be drawn therefrom must be read in a light most favorable to the party opposing the motion." *Duchon v. Cajon Company*, 791 F.2d. 43, 46 (6th Cir. 1986).

The Sixth Circuit further explained the District Court's role in evaluating the proof on a summary judgment motion:

> A district court is not required to speculate on which portion of the record the nonmoving party relies, nor is it obligated to wade through and search the entire record for some specific facts

> that might support the nonmoving party's claim. Rule 56 contemplates a limited marshaling of evidence by the nonmoving party sufficient to establishing a genuine issue of material fact for trial. This marshaling of evidence, however, does not require the nonmoving party to "designate" facts by citing specific page numbers. Designate means simply "to point out the location of." *Webster's Third New InterNational Dictionary* (1986).
>
> Of course, the designated portions of the record must be presented with enough specificity that the district court can readily identify the facts upon which the nonmoving party relies; but that need for specificity must be balanced against a party's need to be fairly apprised of how much specificity the district court requires. This notice can be adequately accomplished through a local court rule or a pretrial order.

*InterRoyal Corp. v. Sponseller*, 889 F.2d 108, 111 (6th Cir. 1989). Here, the parties have given some references to the proof upon which they rely. Local Rule 8(h)(7)(A) and (C) require a showing of undisputed and disputed facts.

In *Street*, the Court of Appeals discussed the trilogy of leading Supreme Court decisions, and other authorities on summary judgment and synthesized ten rules in the "new era" on summary judgment motions

> 1. Complex cases are not necessarily inappropriate for summary judgment.
>
> 2. Cases involving state of mind issues are not necessarily inappropriate for summary judgment.
>
> 3. The movant must meet the initial burden of showing 'the absence of a genuine issue of material

fact' as to an essential element of the non-movant's case.

4. This burden may be met by pointing out to the court that the respondent, having had sufficient opportunity for discovery, has no evidence to support an essential element of his or her case.

5. A court should apply a federal directed verdict standard in ruling on a motion for summary judgment. The inquiry on a summary judgment motion or a directed verdict motion is the same: 'whether the evidence presents a sufficient disagreement to require submission to a jury or whether it is so one-sided that the party must prevail as a matter of law.'

6. As on federal directed verdict motions, the 'scintilla rule' applies, *i.e.*, the respondent must adduce more than a scintilla of evidence to overcome the motion.

7. The substantive law governing the case will determine what issues of fact are material, and any heightened burden of proof required by the substantive law for an element of the respondent's case, such as proof by clear and convincing evidence, must be satisfied by the respondent.

8. The respondent cannot rely on the hope that the trier of fact will disbelieve the movant's denial of a disputed fact, but must 'present affirmative evidence in order to defeat a properly supported motion for summary judgment.'

9. The trial court no longer has the duty to search the entire record to establish that it is bereft of a genuine issue of material fact.

> 10. The trial court has more discretion than in the 'old era' in evaluating the respondent's evidence. The respondent must 'do more than simply show that there is some metaphysical doubt as to the material facts.' Further, '[w]here the record taken as a whole could not lead a rational trier of fact to find' for the respondent, the motion should be granted. The trial court has at least some discretion to determine whether the respondent's claim is 'implausible.

*Street*, 886 F.2d at 1479-80.

The Court has distilled from these collective holdings four issues that are to be addressed upon a motion for summary judgment: (1) has the moving party "clearly and convincingly" established the absence of material facts?; (2) if so, does the plaintiff present sufficient facts to establish all the elements of the asserted claim or defense?; (3) if factual support is presented by the nonmoving party, are those facts sufficiently plausible to support a jury verdict or judgment under the applicable law?; and (4) are there any genuine factual issues with respect to those material facts under the governing law?

As to Plaintiffs' rights to privacy claims, the Supreme Court expressly stated that a person has an "individual interest in avoiding disclosures of personal matters." *Whalen v. Roe*, 429 U.S. 589, 599 (1977). The Sixth Circuit has expressly held that in *Kalistrom v. City of Columbus*, 136 F.3d 1050 (6th Cir 1991):

> Individuals have "a clearly established right under the substantive component of the Due Process Clause to personal security and to bodily integrity," and this right is fundamental where "the magnitude of the liberty deprivation that

> [the] abuse inflicts upon the victim . . . strips the very essence of personhood" that an individual's "interest in preserving her life is one of constitutional dimension."

*Id.* at 1062-63.

In *Kallstrom*, undercover police officers, whose names and addresses were publically disclosed by City officials pursuant to an Ohio Open Records Act filed a Section 1983 action for violation of their privacy rights. These officers testified in a criminal trial of gang members charged with drug trafficking and known for violence. These officers sued for the disclosure of their personal information and the Sixth Circuit stated:

> We see no reason to doubt that where disclosure of this personal information may fall into the hands of person likely to seek revenge upon the officers for their involvement in the *Russell* case, the City created a very real threat to the officers' and their family members' personal security and bodily integrity, and possibly their lives. Accordingly, we hold that the City's disclosure of this private information about the officers to defense counsel in the *Russell* case rises to constitutional dimensions, thereby requiring us under *DeSanti* to balance the officers' interests against those of the City.

136 F.3d at 1063.

Yet, the Sixth Circuit also made it clear that not all disclosures of such personal information are actionable:

> We do not mean to imply that every governmental act which intrudes upon or threats to intrude upon an individual's body invokes the Fourteenth Amendment. *But where the release of*

> *private information places an individual at substantial risk of serious bodily harm. possibly even death, from a perceived likely threat, the "magnitude of the liberty deprivation . . . Strips the very essence of personhood."* Under these circumstances. the governmental act "reaches a level of significance sufficient to invoke strict scrutiny as an invasion of personhood."

*Id.* at 1064. (emphasis added) (quoting Lawrence H. Tribe, "American Constitutional Law," 1333 (2nd ed. 1988)).

As to the City officials' liability for this conduct, the Sixth Circuit deemed the disclosure to result in a state created danger:

> We hold that the City's action placed the officers and their family members in "special danger" by substantially increasing the likelihood that a private actor would deprive them of their liberty interest in personal security. Anonymity is essential to the safety of undercover officers investigating a gang-related drug conspiracy, especially where the gang as [sic] demonstrated a propensity for violence.

*Id.* at 1067.

As to the specific items in the officers' personnel file that were held to create this special danger, the Sixth Circuit also listed the following:

> *We hold that because disclosure of the officers' address, phone numbers, and driver's licenses, as well as the names, addresses,* and phone number *of their family members*, placed the officers and their families at substantial risk of serious bodily harm, the prior release of this information encroached upon their fundamental

> rights to privacy and personal security under the Due Process Clause of the Fourteenth Amendment.

*Id.* at 1068. (emphasis added).

Yet, to establish the City officials' liability in a Section 1983 action, the Sixth Circuit later stated: "The requisite intent of state officials is higher in state-created-danger actions in ordinary tort claims. Neither simple nor gross negligence on the part of state officials is sufficient to support a finding of a constitutional violation. *Robinson v. Township of Redford*, 48 Fed. Appx. 925, 929 (6th Cir. 2002).

Applying these principles here, there is undisputed evidence that the City violated *Kallstrom* by disclosing the names of Hall's wife, daughter and parents (including his parents' work location). The City officials' redaction of Hall's personnel information and their meeting with Hall and his counsel on the release of the information could be interpreted to show at a minimum the City's awareness of a potential threat to Eric Hall's safety, and at best, a significant threat given the amount of public controversy over the shooting of the dog. There is lay and expert testimony that the Defendants' disclosures, particularly the disclosure to the Putnam Pit, given the threat of a bounty by the Animal Liberation Front, substantially increased the risk of harm to Hall and his family.

Material factual disputes exist on whether the City complied with *Kallstrom's* prior notice requirement in this instance. There are also factual disputes about Shipley's personal involvement in the disclosures as well as between O'Mara's letter and Terry's testimony on the police department's role in making this assessment. These facts are

material because O'Mara's proposal and state law require the police department and/or the chief law enforcement officer to assess the danger to the officer. Terry disavows any involvement in the redacted disclosures. As discussed, *infra*, under state law, Terry, as the chief law enforcement officer is expressly listed as a potential custodian of these records and is the person who makes the initial risk assessment. In the Court's view, these factual disputes preclude an award of summary judgment.

Plaintiffs appear to argue that an absolute right to bar disclosure of personnel information is established by *Kallstrom*. The Defendants argue that *Kallstrom* applies only upon evidence of a substantial threat of harm to Hall and/or his family. The Court respectfully disagrees with both positions.

*Kallstrom's* right of privacy, in this context, creates procedural rights of prior notice and an opportunity to be heard before disclosure "only where the disclosure of the requested information could *potentially threaten* the officers' and their family's security." *Kallstrom*, 136 F.3d at 1069. (emphasis added). Thus, not every disclosure of Hall's personnel record is actionable in violation of his right to privacy. Yet, to recover damages, *Kallstrom* requires proof of a "substantial risk of serious bodily harm, possibly even death, from a perceived likely threat. . . . " *Id.* at 1064. Moreover, as noted above, the Sixth Circuit also requires proof that the City officials' disclosures reflected deliberate indifference to the personal safety of Hall and his family. Based upon the proof cited above, a trier of facts could reasonably conclude that the Defendants' disclosures created a substantial risk of harm to Hall and his family of which the Defendants were aware.

The Attorney General finally argues that the facts do not establish a substantial risk of threat to Hall, but, as noted earlier, the procedural rights under *Kallstrom* apply to "potential risk." Whether there were potential or substantial risks of threats prior to the initial disclosure is a material issue of fact.

The issue of Plaintiffs' waiver of their privacy rights by Hall's interviews, as asserted by the Defendants, is a factual issue for the jury to decide. These interviews may impact the issue of injury and damages that is also a jury issue.

As to Terry and Shipley's qualified immunity defense, qualified immunity requires the Court to consider whether "[t]aken in the light most favorable to the party asserting the injury, do the facts allege show the officer's conduct violated a constitutional right." *Saucier v. Katz*, 533 U.S. 194, 201 (2001). The § 1983 plaintiff who seeks damages must also show that the legal right at issue was clearly established at the time of the violation. *Mitchell v. Forsyth*, 472 U.S. 511 (1985).

The Sixth Circuit adopted the following test to determine whether a right is clearly established: "In order to be clearly established, a question must be decided either by the highest court in the state where the case arose, by a United States Court of Appeals, or by the Supreme Court." *Robinson v. Bibb*, 840 F.2d 349, 351 (6th Cir. 1988) (citation omitted). Later, the decisions of the District Court also could be included in deciding whether the right at issue was clearly established at the time of the alleged violation.

Our review of the Supreme Court's decisions and of our own precedent leads us to conclude

> that, in the ordinary instance, *to find a clearly established constitutional right, a district court must find binding precedent by the Supreme Court, its Court of Appeals or itself. In an extraordinary case, it may be possible for the decisions of other courts to clearly establish a principle of law.* For the decisions of other courts to provide such 'clearly established law,' these decisions must both point unmistakably to the unconstitutionality of the conduct complained of and be so clearly foreshadowed by applicable direct authority as to leave no doubt in the mind of a reasonable officer that his conduct, if challenged on constitutional grounds, would be found wanting. Here a mere handful of decisions of other circuits and district courts, which are admittedly novel, cannot form the basis for a clearly established right in this circuit.

*Ohio Civil Serv. Employees Ass'n v. Seiter*, 858 F.2d 1171, 1177-78 (6th Cir. 1988) (emphasis added).

The Sixth Circuit set forth a three part test on qualified immunity that is as follows:

> First, we determine whether, based upon the applicable law, the facts viewed in the light most favorable to the plaintiffs show that a constitutional violation has occurred. Second, we consider whether the violation involved a clearly established right of which a reasonable person would have known. Third, we determine whether the plaintiff has offered sufficient evidence to indicate what the official allegedly did was objectively unreasonable in light of the clearly established constitutional rights.

*Feathers v. Aey*, 319 F.3d 843, 848 (6th Cir. 2003).

Applying the *Feathers* test, *Kallstrom* and the facts outlined above, established violations of Plaintiffs' privacy rights under the Due Process Clause of the Fourteenth Amendment. The Court concludes that *Kallstrom* satisfies the clearly established right element of the *Feathers* test. The Defendants' releases of the names of Hall's wife, daughter and parents reflect objectively unreasonable conduct in light of *Kallstrom* of which the Defendants were clearly aware. There are material factual disputes on the critical issue of risk to personal safety that impacts whether the plaintiffs' privacy rights under *Kallstrom* were violated. The Court does not view these material factual disputes on these claims to apply to whether qualified immunity should be awarded, but rather to the sufficiency of the evidence on Plaintiffs' due process claim. Plaintiffs' claims for the Defendants' alleged failure to cooperate is not supported by any case law and the Defendants are awarded summary judgment on that claim.

As to Plaintiffs' constitutional challenge the Tennessee Open Records Act, the Act's pertinent provisions are two fold: (1) release of information about undercover police officers; and (2) limitations or disclosure of other public employees, including police officers. As to the general statute for all public employees, Tennessee's Open Records statute provides, as follows:

> The following records or information of any state, county, municipal or other public employee in the possession of a governmental entity in its capacity as an employer shall be treated as confidential and shall not be open for inspection by members of the public: unpublished telephone numbers; bank account information; social security number; driver license information except where driving or operating a vehicle is part of the

employee's job description or job duties or incidental to the performance of the employee's job; and the same information of immediate family members or household members.

(2) Information made confidential by this subsection shall be redacted wherever possible and nothing in this subsection shall be used to limit or deny access to otherwise public information because a file, a document, or date file contains confidential information.

(3) Nothing in this subsection shall be construed to limit access to these records by law enforcement agencies, courts or other governmental agencies performing official functions.

(4) Nothing in this subsection shall be construed to close any personnel records of public officers which are currently open under state law.

(5) Nothing in this subsection shall be construed to limit access to information made confidential under this subsection, when the employee expressly authorizes the release of such information.

Tenn. Code Ann, § 10-7-504(f)(1) through (5).

The Tennessee Open Record Act contains a specific provision for employment records of undercover law enforcement officers that reads as follows:

*Personnel information of any police officer designated as working undercover may be segregated and maintained in the office of the chief law enforcement officer.* Such segregated information shall be treated as confidential under this subsection (g). Such segregated information is the address and home telephone number of the

officer as well as the address or addresses and home telephone number or numbers of the members of the officer's household and/or immediate family. *Information in such file which has the potential, if released, to threaten the safety of the officer or the officer's immediate family or household members may be redacted if the chief law enforcement officer determines that its release poses such a risk.*

(B) If the person requesting the information or the officer disagrees with the determination of the chief law enforcement officer, the decision shall be reviewed in a show cause hearing in chancery court.

(2) Nothing in this subsection (g) shall be used to limit or deny access to otherwise public information because a file, a document, or data file contains some information made confidential by subdivision (g)(1).

(3) Nothing in this subsection (g) shall be construed to limit access to these records by law enforcement agencies, courts, or other governmental agencies performing official functions.

(4) Except as provided in subdivision (g)(1). nothing in this subsection (g) shall be construed to close personnel records of public officers. which are currently open under state law.

(5) Nothing in this subsection (g) shall be construed to limit access to information made confidential by subdivision (g)(1), when the employee expressly authorizes the release of such information.

Tenn. Code. Ann. § 10-7-504(g)(1)(A) and (B) (emphasis added).

A third relevant provision of the Act is the process for the inspection of personal information about law enforcement officers:

> (c)(1) Except as provided in § 10-7-504(g), all law enforcement personnel records shall be open for inspection as provided in subsection (a); however, whenever the personnel records of a law enforcement officer are inspected as provided in subsection (a), *the custodian shall make a record of such inspection and provide notice, within three (3) days from the date of the inspection, to the officer who* [sic] *personnel record* [sic] *have been inspected*:
>
> (A) That such inspection has taken place;
>
> (B) The name, address and telephone number of the person making such inspection;
>
> (C) For whom the inspection was made; and
>
> (D) The date of such inspection.
>
> (2) Any person making an inspection of such records shall provide such person's name, address, business telephone number, home telephone number, driver license number or other appropriate identification prior to inspecting such records.

Tenn. Code Ann. § 10-7-503.

Tennessee Attorney General has opined that this latter section is inconsistent with *Kallstrom*.

> It therefore appears that Tenn. Code Ann. § 10-7-503(c) does not comply with federal due process requirements where the custodian of information knows or should know that release of information could potentially threaten the personal security of a law enforcement officer or his

> or her family by substantially increasing the likelihood that a private actor will harm them. Under *Kallstrom*, in those circumstance [sic], the officer must receive prior notice and an opportunity to be heard.

Tenn. Op. Att'y Gen. No. 98-230 WL931489, at *5.

For non-undercover police officers, the statute expressly provides for automatic disclosure of the driver's licenses of those officers who operate vehicles on the job. Under this statute, regular law enforcement officers do not receive prior notice requirement before a release of personal information. Where there is a "potential danger", this statute violates the procedural rights established by *Kallstrom*. Those disclosures without prior notice and an opportunity to he heard as to any "potential risk" runs contrary to *Kallstrom*.

At a minimum, the State needs to present proof as to the compelling state interest for the automatic disclosure of driver's license of police officers who drive on the job, without any prior notice or hearing to the officer, and why such disclosure does not pose a potential threat to law enforcement officers.

For these reasons, the motions for summary judgment filed by the Defendants, City of Cookeville, Shipley and Terry should be denied except as to Plaintiffs' claims concerning the Defendants' failure to cooperate. The State Attorney General's motion for partial summary judgment should also be denied.

During a telephone conference, shortly before trial, the Court announced its ruling with a memorandum to follow and counsel for the Defendants Shipley and Terry announced his intention to appeal the denial of qualified

immunity to his clients. The Court does not believe that the appeal is appropriate in this case, but continued the trial to allow for the opportunity for an appeal.

An appropriate Order is filed herewith.

/s/ William J. Haynes, Jr
WILLIAM J. HAYNES, JR
United States District Judge
8-24-04

The relevant portions of the Tennessee Open Records law are as follows: T.C.A. §10-7-503(a):

> Except as provided in § 10-7-504(f), all state, county and municipal records and all records maintained by the Tennessee performing arts center management corporation, except any public documents authorized to be destroyed by the county public records commission in accordance with § 10-7-404, shall at all times, during business hours, be open for personal inspection by any citizen of Tennessee, and those in charge of such records shall not refuse such right of inspection to any citizen, unless otherwise provided by state law.

T.C.A. §10-7-503(a).

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T.C.A. §10-7-503(c):

> (c)(1) Except as provided in § 10-7-504(g), all law enforcement personnel records shall be open for inspection as provided in subsection (a); however, whenever the personnel records of a law enforcement officer are inspected as provided in subsection (a), the custodian shall make a record of such inspection and provide notice, within three (3) days from the date of the inspection, to the officer whose personnel records have been inspected:
>
> (A) That such inspection has taken place;
>
> (B) The name, address and telephone number of the person making such inspection;
>
> (C) For whom the inspection was made; and
>
> (D) The date of such inspection.

(2) Any person making an inspection of such records shall provide such person's name, address, business telephone number, home telephone number, driver license number or other appropriate identification prior to inspecting such records.

T.C.A. § 10-7-503(c).

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T.C.A. §10-7-504(f):

(f)(1) The following records or information of any state, county, municipal or other public employee in the possession of a governmental entity in its capacity as an employer shall be treated as confidential and shall not be open for inspection by members of the public: unpublished telephone numbers; bank account information; social security number; *driver license information except where driving or operating a vehicle is part of the employee's job description or job duties or incidental to the performance of the employee's job*; and the same information of immediate family members or household members.

(2) Information made confidential by this subsection (f) shall be redacted wherever possible and nothing in this subsection (f) shall be used to limit or deny access to otherwise public information because a file, a document, or data file contains confidential information.

(3) Nothing in this subsection (f) shall be construed to limit access to these records by law enforcement agencies, courts, or other governmental agencies performing official functions.

(4) Nothing in this subsection (f) shall be construed to close any personnel records of public officers which are currently open under state law.

(5) Nothing in this subsection (f) shall be construed to limit access to information made confidential under this subsection (f), when the employee expressly authorizes the release of such information.

T.C.A. § 10-7-504(f)(1)-(5) (emphasis added).

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T.C.A. § 10-7-504(g):

(g)(1)(A) Personnel information of any police officer designated as working undercover may be segregated and maintained in the office of the chief law enforcement officer. Such segregated information shall be treated as confidential under this subsection (g). Such segregated information is the address and home telephone number of the officer as well as the address or addresses and home telephone number or numbers of the members of the officer's household and/or immediate family. Information in such file which has the potential, if released, to threaten the safety of the officer or the officer's immediate family or household members may be redacted if the chief law enforcement officer determines that its release poses such a risk.

(B) If the person requesting the information or the officer disagrees with the determination of the chief law enforcement officer, the decision shall be reviewed in a show cause hearing in chancery court.

(2) Nothing in this subsection (g) shall be used to limit or deny access to otherwise public information because a file, a document, or data file contains some information made confidential by subdivision (g)(1).

(3) Nothing in this subsection (g) shall be construed to limit access to these records by law enforcement agencies, courts, or other governmental agencies performing official functions.

(4) Except as provided in subdivision (g)(1), nothing in this subsection (g) shall be construed to close personnel records of public officers, which are currently open under state law.

(5) Nothing in this subsection (g) shall be construed to limit access to information made confidential by subdivision (g)(1), when the employee expressly authorizes the release of such information.

T.C.A. § 10-7-504(g)(1)-(5)

**§ 1983. Civil action for deprivation of rights**

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress, except that in any action brought against a judicial officer for an act or omission taken in such officer's judicial capacity, injunctive relief shall not be granted unless a declaratory decree was violated or declaratory relief was unavailable. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

42 U.S.C.A. § 1983